

DATE: January 16, 1998

CASE NO: 95-INA-373

In the Matter of

PIZZA HUT  
Employer

on behalf of

DIANI RAFALINA MARJOHAN  
Alien

Appearances: Richard S. Bromberg, Esq.  
for Employer

Before: Guill, Jarvis, and Vittone  
Administrative Law Judges

DONALD B. JARVIS  
Administrative Law Judge

### **DECISION AND ORDER**

This case arises from Pizza Hut's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

### **Statement of the Case**

On December 20, 1993, Employer filed a Form ETA 750 Application for Alien Employment Certification with the Virginia Employment Commission ("VEC") on behalf of the Alien, Diani Refalina Marjohan. (AF 37-40). The job opportunity was listed as "Assistant Manager". The job duties were described as follows:

Coordinates food service activities of restaurant: Estimates food and beverage costs and requisitions or purchases supplies. Confers with food preparation and other personnel to plan menus and related activities such as dinning room operations. Investigates and resolves food quality and service complaints.

(AF 31).

The stated job requirement for the position, as set forth on the application, included a 4-year B.S. degree in Business Administration. (Id.). VEC classified the position as "Manager, Food Service" under Dictionary of Occupational Titles ("D.O.T.") category 187.167-106. (AF 18.)

The CO issued a Notice of Findings ("NOF") on October 21, 1994, proposing to deny the certification because the stated job requirement was unduly restrictive. (AF 12-14). In so finding, the CO stated that the proper job classification for the position is "Manager, Fast Food Services". The CO stated that based upon the Specific Vocational Preparation ("SVP") guidelines, the normal requirement for the occupation of "Manager, Fast Food Services" is only 6 months to 1 year combined education, training and experience. Thus, the CO found that the stated educational requirement of a bachelor degree was excessive and in violation of the provisions of 20 C.F.R. §656.21(b)(2). (AF 13).

The Employer submitted its rebuttal on December 30, 1994. (AF 6-9). It consisted of a letter from the Employer's attorney<sup>1</sup>, along with a restaurant financial report. The CO issued a Final Determination ("FD") on January 13, 1995, denying certification because the Employer failed to establish a "business necessity" for the unduly restrictive requirement. (AF 3-5).

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<sup>1</sup>It was signed by Guillermo Uriarte, a legal Assistant. (AF 8).

On February 18, 1995, the Employer requested an extension of time so that it could file a Request for Reconsideration. In the alternative, the Employer sought a Request for Review. (AF 2). On March 16, 1995, the CO denied the request for an extension of time, finding that he lacked the authority to grant such a request, and forwarded the case to the Board for review. (AF 1).

### **Discussion**

The NOF found the education requirement to be unduly restrictive, because it exceeded the normal SVP requirements for the position of “Manager, Fast Food Services”. The CO provided the Employer with the following two options to cure the deficiency: 1) Establish that the requirements are justified by “business necessity”; or 2) Delete the restrictive requirements and re-advertise. (AF 13-14).

The Employer’s rebuttal attempted to establish a “business necessity” for the bachelor degree requirement. In order to establish “business necessity” the employer must establish: 1) that the requirement bears a reasonable relationship to the occupation in the context of the employer’s business; and 2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Information Industries, Inc., 88-INA-82 (Feb. 9, 1990) (en banc).

We agree with the CO that the Employer failed to establish a “business necessity”. In rebuttal, the Employer’s attorney stated that the Employer normally requires a bachelor degree for the position, and further described the importance of the position offered. (AF 6-9). There is nothing in the record to suggest that the attorney had personal knowledge of these facts, and there was no supporting documentation from the Employer. We will not consider this representation because assertions by an employer’s attorney that are not supported by underlying statements by a person with knowledge of the facts do not constitute evidence. Wilton Stationers, Inc., 94-INA-232 (Apr. 20, 1995); Moda Lines, Inc., 90-INA-424 (Dec. 11, 1991); Mr. and Mrs. Elias Ruiz, 90-INA-446 (Dec. 9, 1991). The Employer’s attorney, in its Request for Review Brief, included a statement from the Employer which is not part of the record before the CO. Evidence first submitted with a Request for Review will not be considered. La Prairie Mining Limited, 95-INA-11 (Apr. 4, 1997).

The only remaining evidence to consider is the financial statement from the Employer. (AF 9). We fail to see how the Employer’s sales and profit figures relate to its requirement for a bachelor degree for the position of Manager. The Employer has not established that the size of its profits and sales correlates to the educational requirements of its employees. We agree with the CO’s analysis, and find that the Employer has failed to establish a “business necessity” for the restrictive job requirement. See, e.g., Jana Corporation, 94-INA-5 (Dec. 21, 1994).

Finally, the Employer, for the first time in its Request for Review Brief, argues that the position should have been classified as “Manager, Food Service” rather than “Manager, Fast Food Services.” We will not consider this argument since a matter raised in the NOF that was not addressed in the rebuttal is deemed admitted. Belha Corporation, 88-INA-24 (May 5, 1989).

We find that the CO properly denied certification because the Employer failed to document a “business necessity” for the unduly restrictive job requirement.

**Order**

The Certifying Officer’s denial of labor certification is AFFIRMED.

For the Panel:

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DONALD B. JARVIS  
Administrative Law Judge

San Francisco, California